

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-97384; File No. SR-Phlx-2023-11)

April 26, 2023

Self-Regulatory Organizations; Nasdaq PHLX LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Amend its Schedule of Fees and Credits at Equity 7, Section 3

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”)<sup>1</sup>, and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on April 12, 2023, Nasdaq PHLX LLC (“Phlx” or “Exchange”) filed with the Securities and Exchange Commission (“SEC” or “Commission”) the proposed rule change as described in Items I and II, below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization’s Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend the Exchange’s schedule of fees and credits at Equity 7, Section 3. The text of the proposed rule change is available on the Exchange’s Website at <https://listingcenter.nasdaq.com/rulebook/phlx/rules>, at the principal office of the Exchange, and at the Commission’s Public Reference Room.

II. Self-Regulatory Organization’s Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in

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<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 17 CFR 240.19b-4.

Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of the proposed rule change is to amend the Exchange's schedule of fees and credits at Equity 7, Section 3.<sup>3</sup> Currently, the Exchange has a schedule at Equity 7, Section 3(a), which consists of several different credits that it provides for orders in securities priced at \$1 or more per share that add liquidity on the Exchange and several different charges that it assesses for orders in such securities that access liquidity on the Exchange. The Exchange has a schedule at Equity 7, Section 3(b), which consists of charges and credits that apply for securities priced at less than \$1 per share. The Exchange proposes to amend Equity 7, Section 3(a) to: (i) add two new credit tiers for displayed Quotes/Orders; (ii) adjust an existing credit for displayed Quotes/Orders; and (iii) add a supplemental credit for displayed Quotes/Orders. In addition, the Exchange proposes to amend Equity 7, Section 3(b) to adjust an existing charge for securities priced at less than \$1 per share.

Proposed Changes to Equity 7, Section 3(a)

The Exchange proposes to establish two new rebates to member organizations for adding displayed liquidity. First, the Exchange proposes to establish a new credit that will reward a member organization with a credit of \$0.0033 per share executed for Quotes/Orders that provide 0.15% or more of total Consolidated Volume during the month. Second, the Exchange proposes

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<sup>3</sup> The Exchange initially filed the proposed pricing changes on April 3, 2023 (SR-PHLX-2023-10). The instant filing replaces SR-PHLX-2023-10, which was withdrawn on April 12, 2023.

to establish a new credit that will reward a member organization with a credit of \$0.0032 per share executed for Quotes/Orders that provide 0.07% or more of total Consolidated Volume during the month. The Exchange also proposes to adjust an existing credit from \$0.0032 per share executed to \$0.0030 per share executed for Quotes/Orders that provide 0.05% or more of total Consolidated Volume during the month. Finally, the Exchange proposes to establish a new supplemental rebate that will reward a member organization with a supplemental credit of \$0.00005 per share executed for displayed Quotes/Orders that: (i) provides 0.10% or more of total Consolidated Volume during the prior month; and (ii) provides 0.10% or more of total Consolidated Volume during the month.

The proposed new credits will provide incentives to member organizations to add liquidity to the Exchange. To the extent that the proposed new credits succeed in increasing liquidity on the Exchange, the Exchange hopes that additional liquidity will improve the quality of the market and help to grow it over time. The Exchange offers these credits as a means of improving market quality by providing its members with an incentive to increase liquidity on the Exchange. The Exchange also proposes to reduce an existing credit, as noted above. The Exchange has limited resources available to it to offer its members market-improving incentives, and it allocates those limited resources to those segments of the market where it perceives the need to be greatest and/or where it determines that the incentive is likely to achieve its intended objective.

#### Proposed Change to Equity 7, Section 3(b)

The Exchange proposes to adjust the charge to member organizations for accessing liquidity on the Exchange in securities priced at less than \$1 per share from the current rate of 0.20% of the total transaction cost to 0.30% of the total transaction cost. Again, the Exchange

has limited resources available to it to offer its members market-improving incentives, and it allocates those limited resources to those segments of the market where it perceives the need to be greatest and/or where it determines that the incentive is likely to achieve its intended objective. Accordingly, the Exchange proposes to adjust the charge for accessing liquidity on the Exchange in securities priced at less than \$1 per share, as noted above.

## 2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,<sup>4</sup> in general, and furthers the objectives of Sections 6(b)(4) and 6(b)(5) of the Act,<sup>5</sup> in particular, in that it provides for the equitable allocation of reasonable dues, fees and other charges among members and issuers and other persons using any facility, and is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

The Exchange's proposed changes to its schedule of credits are reasonable in several respects. As a threshold matter, the Exchange is subject to significant competitive forces in the market for equity securities transaction services that constrain its pricing determinations in that market. The fact that this market is competitive has long been recognized by the courts. In NetCoalition v. Securities and Exchange Commission, the D.C. Circuit stated as follows: “[n]o one disputes that competition for order flow is ‘fierce.’ ... As the SEC explained, ‘[i]n the U.S. national market system, buyers and sellers of securities, and the broker-dealers that act as their order-routing agents, have a wide range of choices of where to route orders for execution’; [and] ‘no exchange can afford to take its market share percentages for granted’ because ‘no exchange

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<sup>4</sup> 15 U.S.C. 78f(b).

<sup>5</sup> 15 U.S.C. 78f(b)(4) and (5).

possesses a monopoly, regulatory or otherwise, in the execution of order flow from broker dealers' ....”<sup>6</sup>

The Commission and the courts have repeatedly expressed their preference for competition over regulatory intervention in determining prices, products, and services in the securities markets. In Regulation NMS, while adopting a series of steps to improve the current market model, the Commission highlighted the importance of market forces in determining prices and SRO revenues and, also, recognized that current regulation of the market system “has been remarkably successful in promoting market competition in its broader forms that are most important to investors and listed companies.”<sup>7</sup>

Numerous indicia demonstrate the competitive nature of this market. For example, clear substitutes to the Exchange exist in the market for equity security transaction services. The Exchange is only one of several equity venues to which market participants may direct their order flow. Competing equity exchanges offer similar tiered pricing structures to that of the Exchange, including schedules of rebates and fees that apply based upon members achieving certain volume thresholds.

Within this environment, market participants can freely and often do shift their order flow among the Exchange and competing venues in response to changes in their respective pricing schedules. As such, the proposal represents a reasonable attempt by the Exchange to increase its liquidity and market share relative to its competitors.

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<sup>6</sup> NetCoalition v. SEC, 615 F.3d 525, 539 (D.C. Cir. 2010) (quoting Securities Exchange Act Release No. 59039 (December 2, 2008), 73 FR 74770, 74782-83 (December 9, 2008) (SR-NYSEArca-2006-21)).

<sup>7</sup> Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37499 (June 29, 2005) (“Regulation NMS Adopting Release”).

The Exchange believes it is reasonable, equitable, and not unfairly discriminatory to amend Equity 7, Section 3(a) to: (i) add two new credit tiers for displayed Quotes/Orders; (ii) adjust an existing credit for displayed Quotes/Orders; and (iii) add a supplemental credit for displayed Quotes/Orders. Taken together, these amendments will better align incentives with the Exchange's needs. The Exchange has limited resources to devote to incentive programs, and it is appropriate for the Exchange to reallocate these incentives periodically in a manner that best achieves the Exchange's overall mix of objectives. In addition, the proposed new credits would provide incentives to member organizations to add liquidity to the Exchange. To the extent that the proposed new credits succeed in increasing liquidity on the Exchange, the Exchange hopes that additional liquidity will improve the quality of the market and help to grow it over time.

The Exchange also believes it is reasonable, equitable, and not unfairly discriminatory to amend Equity 7, Section 3(b) to adjust an existing charge for securities priced at less than \$1 per share as the Exchange has limited resources to devote to incentive programs, and it is appropriate for the Exchange to reallocate these incentives periodically in a manner that best achieves the Exchange's overall mix of objectives.

Those participants that are dissatisfied with the changes to the Exchange's schedule of credits and fees are free to shift their order flow to competing venues that provide more generous incentives or less stringent qualifying criteria.

**B. Self-Regulatory Organization's Statement on Burden on Competition**

The Exchange does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.

**Intramarket Competition**

The Exchange does not believe that its proposals will place any category of Exchange participant at a competitive disadvantage.

The Exchange intends for its proposed changes to its fees and credits to reallocate its limited resources more efficiently and to align them with the Exchange's overall mix of objectives. The Exchange notes that its members are free to trade on other venues to the extent they believe that these proposals are not attractive. As one can observe by looking at any market share chart, price competition between exchanges is fierce, with liquidity and market share moving freely between exchanges in reaction to fee and credit changes.

#### Intermarket Competition

In terms of inter-market competition, the Exchange notes that it operates in a highly competitive market in which market participants can readily favor competing venues if they deem fee levels at a particular venue to be excessive, or rebate opportunities available at other venues to be more favorable. In such an environment, the Exchange must continually adjust its credits and fees to remain competitive with other exchanges and with alternative trading systems that have been exempted from compliance with the statutory standards applicable to exchanges. Because competitors are free to modify their own credits and fees in response, and because market participants may readily adjust their order routing practices, the Exchange believes that the degree to which credit or fee changes in this market may impose any burden on competition is extremely limited. The proposals are reflective of this competition.

Even as one of the largest U.S. equities exchanges by volume, the Exchange has less than 20% market share, which in most markets could hardly be categorized as having enough market power to burden competition. Moreover, as noted above, price competition between exchanges is fierce, with liquidity and market share moving freely between exchanges in reaction to fee and credit changes. This is in addition to free flow of order flow to and among off-exchange venues, which comprises upwards of 50% of industry volume.

In sum, if the changes proposed herein are unattractive to market participants, it is likely that the Exchange will lose market share as a result. Accordingly, the Exchange does not believe that the proposed changes will impair the ability of members or competing order execution venues to maintain their competitive standing in the financial markets.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants, or Others

No written comments were either solicited or received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A) of the Act<sup>8</sup> and paragraph (f) of Rule 19b-4 thereunder.<sup>9</sup> At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is: (i) necessary or appropriate in the public interest; (ii) for the protection of investors; or (iii) otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments:

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an e-mail to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number SR-Phlx-2023-11 on the subject line.

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<sup>8</sup> 15 U.S.C. 78s(b)(3)(A).

<sup>9</sup> 17 CFR 240.19b-4(f).

Paper Comments:

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090.

All submissions should refer to File Number SR-Phlx-2023-11. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet website (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street, NE, Washington, DC 20549 on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. Do not include personal identifiable information in submissions; you should submit only information that you wish to make available publicly. We may redact in part or withhold entirely from publication submitted material that is obscene or

subject to copyright protection. All submissions should refer to File Number SR-Phlx-2023-11 and should be submitted on or before [insert date 21 days from publication in the Federal Register].

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>10</sup>

Sherry R. Haywood  
Assistant Secretary

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<sup>10</sup> 17 CFR 200.30-3(a)(12).